EXTENSIONS OF REMARKS

PROCEDURES FOR THE PROTECTION OF CLASSIFIED INFORMATION IN THE CUSTODY OF THE FEDERAL COURTS

HON. EDWARD P. BOLAND
OF MASSACHUSETTS
IN THE HOUSE OF REPRESENTATIVES

Thursday, October 15, 1981

● Mr. BOLAND. Mr. Speaker, last year the Congress enacted the classified Information Procedures Act (Public Law 96-456).

Section 9(a) of the statute states:

Within one hundred and twenty days of the date of the enactment of this Act, the Chief Justice of the United States, in consultation with the Attorney General, the Director of Central Intelligence, and the Secretary of Defense shall prescribe rules establishing procedures for the protection against unauthorized disclosure of any classified information in the custody of the United States district courts, courts of appeal, or Supreme Court. Such rules, and any chanes in such rules, shall be submitted to the appropriate committees of Congress and shall become effective forty-five days after such submission.

Last February, when the required security procedures were submitted to the Congress, I inserted a copy of them into the CONGRESSIONAL RECORD. I noted at that time while the act contained no provision for congressional approval or veto. I thought it important that interested Members of Congress, the bar, and the public have an opportunity to comment on them before they became effective.

In the months that have elapsed since the publication of the security procedures, Chairman RODINO and I have communicated to the Chief Justice our concern that the procedures contained some troublesome sections which appear to exceed the scope of what Congress intended the security procedures to cover.

Since I think it important that Members of the Congress, the bar, and the public continue to be kept informed of the important issues involved, I include the correspondence to which I refer in the RECORD. The security procedures were printed in the CONGRESSIONAL RECORD of February 19, 1981, on page E581:

PERMANENT SELECT COMMITTEE ON INTELLIGENCE,
Washington, D.C., March 19, 1981.

Hon. WARREN E. BURGER,
Chief Justice of the United States,
Supreme Court of the United States,
Washington, D.C.

DEAR MR. CHIEF JUSTICE: We are writing to express our views on the security procedures which were submitted to the Congress on February 23, 1971 pursuant to section 9(a) of the Classified Information Procedures Act. As you know, the Committees which we chair share jurisdiction over this Act.

Generally, we consider the proposed procedures to be an effective and reasonable response to the statutory direction to establish procedures for the protection of classified information physically in the custody of the federal courts.

We are of the opinion, however, that certain aspects of the procedures may extend beyond those areas which the Congress intended the procedures to cover. The legislative intent in this area is set out on page 30 of the Report of the House Permanent Select Committee on Intelligence (H. Rept. 96-831, Part 1 to accompany H.R. 4736):

"The Committee wishes to emphasize that the security procedures required by section 110 are meant to deal with such matters as how and where classified documents are to be stored, what court personnel will have access to them, security clearances for court personnel, and related matters. Issues of particular effect on the trial process and the rights of defendants such as defense access to classified materials, are to remain within the province of the individual trial judge and the judge's authority to issue protective orders."

Sections 5 and 11 of the procedures could be interpreted to extend beyond matters related to the physical safekeeping of classified documents and to impinge upon areas of "particular concern to the trial process".

On its face, section 5 purports to authorize the government to obtain information about defense counsel. We question the need for and the propriety of such a provision. To the extent that it purports to authorize any activity by the government that is not now authorized, it is beyond the proper scope of the security procedures. To the extent that it may be premised on the government's desire to "clear" defense personnel, section 5 surely relates to "defense access to classified documents". To the extent that its purpose is to approve "lawful" activity by the government in gathering information, and communicating it to the court, it is superfluous and thus adds confusion to the procedures.

Section 11 can be construed to authorize the Department of Justice Security Officer or executive branch agencies to determine the disposition of portions of the record of the case which contain classified information. Presumably, such a construction is not intended; the usual rules regarding the length of time the record of a case is preserved will apply, and section 11 pertains only to where that part of the record of a case containing classified information is to be stored. However, this latter construction is not at all clear from a reading of the section.

A third provision that is troubling to us is contained in the second paragraph of section 9(a), which requires that "every document filed by the defendant in the case shall be filed under seal and promptly turned over to the court security officer". In this regard, we would note with approval the comments of Mr. Philip Lacovara:

In addition, in the second paragraph of Section 9 (page 7) there is an ambiguity that I would have corrected. That paragraph directs that every document filed by the defendant "in the case" shall be filed under seal, but I have had trouble determining how covered cases will be identified. Presumably, this directive applies only in cases in which a court security officer has been appointed and in which that fact has been called to the defendant's attention.

Even in cases where a court security officer is appointed, however, it may be utterly unnecessary to go to the extreme of immediately sealing all defense filings (but not necessarily all prosecution filings). This seems like overkill, and I would have left the formulation of specific confidentiality orders to the trial judge.

Because we believe that the procedures in question may exceed the scope contemplated by the Congress, we urge their reexamination. Our concern—which we invite you to allay—is that the procedures, as they now stand, may take from the trial court decisions going to the heart of the adversary process. Such decisions ought to be weighed by judges in the context of individual trials.

Sincerely yours,

EDWARD P. BOLAND,
Chairman,
Permanent Select Committee on Intelligence.

PETER W. RODINO, Jr.,
Chairman,
Committee on the Judiciary.

SUPREME COURT OF THE UNITED STATES,
Washington, D.C., April 6, 1981.

Hon. EDWARD P. BOLAND,
Chairman, Permanent Select Committee on Intelligence, U.S. House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: Thank you for your letter regarding the security procedures I submitted to the Congress on February 12, 1981 pursuant to the provisions of Section 9(a) of the Classified Information Procedures Act of 1980. I have referred your letter and questions concerning the security procedures to those who prepared the initial draft of the rules. As you know, this was done in consultation with representatives from the Central Intelligence Agency, the Department of Defense, the Department of Justice, and the Administrative Office of the United States Courts. As soon as I receive their comments I will respond further.

Cordially,

WARREN E. BURGER.

SUPREME COURT OF THE UNITED STATES,
Washington, D.C., July 10, 1981.

Hon. EDWARD P. BOLAND,
Chairman, Permanent Select Committee on Intelligence, U.S. House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: I regret the delay in responding to your letter of March 19, 1981; however the Term that just ended has been an extraordinarily heavy one because of the important cases that had to be decided at the end of the Term. My response to your letter and questions concerning the security procedures for handling classified information in federal courts, which became effective on March 30, 1981, is attached. Those who did the basic work for me in preparing the initial draft of the rules have reexamined the procedures and have prepared a short memorandum explaining the purpose and meaning of the sections about which you have raised some questions. Enclosed is a copy of the memorandum I sent to Congressman Edwards that discusses the purpose and meaning of other aspects of the rules.

● This "bullet" symbol identifies statements or insertions which are not spoken by the Member on the floor.

The security procedures have been in operation now for over ninety days. After we have had some experience in working with them I will reexamine the procedures. At such time, amendments to the rules will be considered and changes, if necessary, will be made. In the meantime, I believe the procedures should be given a chance to work in their present form.

Cordially,

WARREN E. BURGER.

Enclosure.

BACKGROUND MATERIAL FOR CHAIRMAN BOLAND AND CHAIRMAN RODINO ON THE SECURITY PROCEDURES FOR THE PROTECTION OF CLASSIFIED INFORMATION IN THE CUSTODY OF THE FEDERAL COURTS

This memorandum is in response to inquiries of Chairman Edward P. Boland of the House Permanent Select Committee on Intelligence, and Chairman Peter W. Rodino of the House Judiciary Committee, raising questions about the interpretation of certain sections of the security procedures submitted to Congress pursuant to Section 9(a) of the Classified Information Procedures Act of 1980. It is the purpose of this memorandum to address the concerns raised by the Congressmen and to explain the intended purpose and meaning of certain provisions of the security procedures.

SECTION 5

Sections 5, 9(a), and 11, the sections which Chairman Boland and Chairman Rodino have raised questions about, were the subject of much discussion in the drafting sessions. Section 5, in particular, was the focus of extensive debate. This section provides that information obtained by the government concerning the trustworthiness of persons acting for the defendant may be brought to the attention of the court for the court's consideration in framing a protective order. In formulating this provision, the Chief Justice was sensitive, not only to the need to develop effective measures to protect against unauthorized disclosure of classified information in the custody of the court, but also to the special nature of the attorney-client relationship. The Chief Justice therefore attempted to avoid the adoption of any procedure which would create undue restrictions on the preparation of an effective defense, or which would unduly infringe upon the rights of defense counsel. After consideration of a number of different approaches to the problem, the language contained in the present section was approved.

As finally adopted, Section 5 reads as follows:

"The government may obtain information by any lawful means concerning the trustworthiness of persons associated with the defense and may bring such information to the attention of the court for the court's consideration in framing an appropriate protective order pursuant to Section 3 of the Act."

Section 5 basically permits the government to make available to the trial judge for use in framing an appropriate protective order any lawfully obtained information concerning the trustworthiness of persons associated with the defense. The purpose of the section is to make clear that it is proper for the court to receive and consider any information in the possession of the government which relates to the trustworthiness of persons associated with the defense.

In drafting Section 5 an effort was made not to include provisions that would exceed the intended scope of the security procedures set forth in the Report of the House Permanent Select Committee on Intelligence (H. Rept. 96-831, Part 1 to accompany H.R. 4736). The report states in part that: "[i]ssues of particular effect on the trial process and the rights of defendants, such as defense access to classified materials, are to remain within the province of the individual trial judge and *the judge's authority to issue protective orders.*" (Emphasis supplied).

The idea is that the trial judge is to retain authority over issues involving the trial process and the rights of the defendant. The trial judge, and the trial judge alone, in other words, decides what classified information the defendant is entitled to receive from the government and what provisions are to be included in a protective order.

Section 5 is consistent with the legislative intent expressed in the House Report in that it permits the trial judge, in cases involving classified information, to determine what information will be released to persons associated with the defense and what kind of protective orders will be issued to protect against unauthorized disclosure of such information. The aim of Section 5 is to assist the court in framing an appropriate protective order by making it clear what kind of information may be properly considered by the court in determining what constraints, if any, should be placed on persons acting on behalf of the defense who are given access to classified information. Section 5 is not meant in any way to interfere with the trial process, or to limit the defense's access to classified information. It does not direct the government or the trial judge to obtain information about persons associated with the defense and it does not authorize any particular type of governmental investigative activity; nor does it require defense personnel to obtain security clearances. While an inquiry concerning defense personnel obviously may be appropriate in some cases, it is clear that Section 5 does not attempt to define the range of inquiry that may be necessary.

What Section 5 does do is set forth what a trial judge *may* consider in framing an appropriate protective order to guard against unauthorized disclosure of classified information. This, of course, does not preclude the trial judge from considering any other information he deems relevant to framing an appropriate protective order. What information the trial judge ultimately decides to consider, and what classified information he decides should be made available to the defense, thus, are matters to be decided solely by the trial judge in the exercise of his discretion.

SECTION 11

Section 11 of the security procedures was also the subject of considerable discussion. Section 11 provides that materials containing classified information will be returned at the conclusion of the trial to the originating department or agency for "appropriate disposition." The letter from Chairman Rodino and Chairman Boland states that this section "can be construed to authorize the Department of Justice security officer or executive branch agencies to determine the disposition of portions of the record of the case which contain classified information." This is not the meaning of the section. With respect to any classified information which becomes part of the record of the case and which is transferred to an executive branch agency or department for "appropriate disposition," the executive branch has only the responsibility of providing secure storage facilities. Federal courts cannot reasonably be expected to retain documents containing sensitive or classified information after the conclusion of the case. They simply do not have the proper storage facilities. The purpose of Section 11 is to ensure the safekeeping of classified materials within the executive branch. A determination by the Department of Justice security officer and the originating agency concerning the "appropriate disposition" of classified materials is not to be viewed as a determination about the "disposal" of such materials. Any portion of a court record which, due to its classified nature, remains in the custody of an executive branch agency will, of course, continue to be subject to the standard guidelines for the preservation of court records. (Under the Records Disposition Program and Schedules adopted by the Judicial Conference in September 1978, criminal case files must be retained a minimum of 23 years after the date of final action.)

SECTION 9(A)

Chairman Boland and Chairman Rodino also raise a question about the provision contained in Section 9(a) of the procedures which requires that "every document filed by the defendant in the case shall be filed under seal and promptly turned over to the court security officer." The purpose of Section 9(a) is to deal with the problem of how to handle documents containing classified information submitted by defense counsel. If no provision were made for dealing with the submissions of defense counsel, classified information could appear automatically on the public record for anyone to read. In order to protect against classified information being inadvertently disclosed, this provision was included.

The fact that the government is not required to submit all of its filings under seal should not be viewed as an imbalance in the procedures. The first paragraph of Section 9(a) gives the court security officer responsibility of marking all documents filed in the case with the appropriate classification level. This provision applies to documents filed by both the prosecution and the defense. Similarly, Section 7(b) of the procedures, which requires that all classified information submitted to the court be placed in the custody of the court security officer for safekeeping, is equally applicable to the prosecution and the defense. The provisions contained in the second paragraph of Section 9(a) are included merely to facilitate the proper handling of the papers filed by the defense. It would be unreasonable to expect that defense counsel will have the necessary knowledge or resources to make a determination about the appropriate classification of its own submissions. The attorney for the government, however, can reasonably be expected to know whether documents submitted to the court on behalf of the prosecution contain classified information. Any classified materials submitted by the government will be handled in accordance with the procedures set forth in Section 7(b) and therefore will be treated in exactly the same way as classified materials submitted by the defense.

It should be noted, moreover, that the sealing requirement of Section 9(a) is only an interim measure insofar as it will apply to unclassified materials. Section 9(a) provides for a prompt examination of every document filed by the defense. As soon as such an examination is made, the court security officer will either mark the document with the appropriate classification marking or, if the document contains no classified information, he will unseal it and place it on the public record. Under this procedure, there will be no significant interference with the ability of the public to gain access to any defense document which does not contain classified information.

If the defense wishes to challenge an agency's classification decision (see Execu-

tive Order 12065), the challenge should be directed to the appropriate Executive Branch agency. Procedures for challenging classification decisions made by the Executive Branch are set forth in programs established by the various Executive Branch agencies. While the trial judge cannot determine whether or not a document should be classified or at what level classification should be, he may resolve a dispute between the government and the defense over whether a document has, in fact, been classified by the government.

A question also was raised regarding how cases subject to the procedures will be identified. Section 1 provides that the procedures are to apply to all proceedings in criminal cases involving classified information and appeals therefrom. Whether or not a particular case involves classified information will be apparent when the provisions of the Classified Information Procedures Act of 1980 are activated. Section 2 of that Act permits any party at any time after the filing of an indictment or information to move for a pretrial conference to consider matters relating to classified information that may arise in connection with the prosecution. The holding of such a conference would clearly indicate to the defense that this is a case to which the security procedures apply.

Moreover, there are a number of notice provisions in the Act, the utilization of which would signal the defense of the necessity to submit all of its filings to the court under seal. For example, Section 6(b)(1) of the Act requires the United States to provide the defendant with notice of classified information that is at issue prior to an evidentiary hearing held under Section 6(a) of the Act. Section 5 requires the defendant to notify the United States and the court in writing whenever it reasonably expects to disclose or to cause the disclosure of classified information in connection with any criminal prosecution. Finally, Section 10 requires that, in any prosecution in which the United States must establish that material relates to the national defense or constitutes classified information, the United States must notify the defendant of the portion of the material that it expects to rely upon to establish the national defense or classified information element of the offense. Where defense counsel receives notice under any of these provisions or where counsel itself provides notice as required by Section 5—the case will be one which "involves classified information" and which is subject to the security procedures. Thus, when the security procedures are read together with the Act itself, there should be no difficulty in determining whether a particular case is covered by Section 9 of the procedures.

In summary, it is clear upon reexamination of the three sections referred to by Chairman Boland and Chairman Rodino that the provisions do not exceed the scope contemplated by Congress. The security procedures, as a whole, give trial judges adequate guidance to protect against the unauthorized disclosure of classified information in the custody of the federal courts. These security procedures do not in any way take from the trial court decisions going to the heart of the adversary process. In each instance, the trial court judge is free to make whatever decision he wishes to make with regard to defense access to classified information, and the rules in no way interfere with the judge's discretion in this regard.

Section 9(a) of the Classified Information Procedures Act provides for the amendment of the security procedures if the need arises. If, contrary to expectations, problems do arise concerning the three sections discussed above, or any other sections, the procedures can be changed. Meanwhile, the representatives of all the agencies consulted in the wording of the original draft of the security procedures agree that the procedures should be given a chance to work in their present form.

PERMANENT SELECT COMMITTEE ON INTELLIGENCE,
Washington, D.C., September 11, 1981.

Hon. WARREN E. BURGER,
Chief Justice of the United States,
Supreme Court of the United States,
Washington, D.C.

DEAR MR. CHIEF JUSTICE: Thank you for your letter and memorandum of July 10 concerning the security procedures promulgated pursuant to the Classified Information Procedures Act.

The memorandum does allay many of the concerns which we expressed in our letter of March 19. However, we remain troubled by section 5 of the procedures.

We are troubled not by the fact that "the government may obtain information by any lawful means concerning the trustworthiness of persons associated with the defense," nor by the fact that, in fashioning a protective order, a trial court may consider such information. Rather, we are concerned (1) that the subject is treated at all, (2) that the authority of the trial judge and the government to engage in such actions appears to flow from the security procedures, and (3) that, in the future, section 5 could be used as precedent to confer or withhold other substantive authorities. None of this, in our view, is within the scope of procedures clearly intended to deal only with the manner in which classified information in physically safeguarded when in the custody of the federal courts.

Therefore, when, as noted in your letter of July 10, a reexamination of the security procedures is conducted, we recommend that section 5 be struck.

Sincerely yours,

EDWARD P. BOLAND,
Chairman, Permanent Select Committee on Intelligence

PETER W. RODINO, Jr.,
Chairman,
Committee on the Judiciary.●

THE CLASSIFIED INFORMATION CRIMINAL TRIAL PROCEDURES ACT

HON. DON EDWARDS

OF CALIFORNIA

IN THE HOUSE OF REPRESENTATIVES

Thursday, October 15, 1981

● Mr. EDWARDS of California. Mr. Speaker, during the 96th Congress the House Intelligence Committee and the House Judiciary Committee worked together to enact the Classified Information Criminal Trial Procedures Act, Public Law 96-456. Section 9 of the act calls for the issuance of security procedures by the Chief Justice to safeguard the handling of classified materials in criminal trials.

Earlier this year the procedures were submitted to Congress. As the enclosed correspondence from the California State Bar indicates, the procedures that were issued may go beyond the original intent of Congress and may unduly interfere with the rights of the defendant and the court. I bring this matter to your attention because I believe we should follow closely the implementation of these procedures to assure that important rights are not infringed.

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, D.C., March 25, 1981.

WARREN E. BURGER,
The Chief Justice of the United States, Supreme Court Building, Washington, D.C.

DEAR MR. CHIEF JUSTICE: I know that Chairman Rodino and Chairman Boland have been in touch with you recently regarding the Security Procedures recently issued pursuant to section 9 of the Classified Information Criminal Trial Procedure Act, Public Law No. 96-456.

In connection with those procedures and some of the issues raised by Chairmen Rodino and Boland, I am enclosing for your information a letter from the State Bar of California to all members of the House and Senate Judiciary Committees. This letter raises many of the concerns felt by the two Chairmen, and by myself as well.

I recommend it to your attention.

With kind regards,

Sincerely,

DON EDWARDS,
Chairman, Subcommittee on Civil and Constitutional Rights.

Enclosure.

STATE BAR OF CALIFORNIA,
San Francisco, Calif., March 18, 1981.

Hon. GEORGE E. DANIELSON,
House of Representatives,
Washington, D.C.

DEAR CONGRESSMAN DANIELSON: The Federal Courts Committee of the State Bar of California recently received from you a copy of the final draft of the Security Procedures Established Pursuant to Public Law No. 96-456 (the "Procedures"). The Procedures were issued pursuant to section 9(a) of the Classified Information Procedures Act, Public Law No. 96-456, 94 Stat. 2025. We understand that unless delayed by the Congress, the Procedures will become effective 45 days after their submission to Congress, which we understand took place on February 17, 1981.

In view of the short time since submission of the Procedures to Congress, the Federal Courts Committee has not had sufficient time to review them fully and to report to the State Bar Board of Governors to ascertain what, if any, position the State Bar wishes to take in regard to the Procedures. However, our review of date has raised a number of significant issues which, the Federal Courts Committee believes, merit close scrutiny by the appropriate committees of Congress. Consequently, we would respectfully urge that the effective date of the Procedures be delayed; that an adequate public comment period be permitted; and that hearings be held in regard to the Procedures.

Based upon our brief review of the Procedures, the Federal Courts Committee's concerns are as follows:

1. Do the Procedures extend beyond the scope authorized by Congress in section 9(a) of the Classified Information Procedures Act? That section provides, in pertinent part, that "the Chief Justice of the United States, in consultation with the Attorney General, the Director of Central Intelligence, and the Secretary of Defense, shall prescribe rules establishing procedures for the protection against unauthorized disclosure of any classified information in the custody of the United States District Courts, Courts of Appeals; or Supreme Court." It would appear that section 9(a)

contemplated, in effect, housekeeping procedures to be imposed by the courts for handling classified information by court personnel. The Procedures, particularly insofar as they relate to the duties of the court security officer, may go beyond simple housekeeping.

2. Do the Procedures require persons acting for the defense to obtain a security clearance before gaining access to classified information? The Procedures are ambiguous in this regard. If a security clearance—which is granted by the Executive Branch—is required, does the government have unwarranted power to interfere with and control selection of the persons acting for the defense?

3. Does section 5 of the Procedures, which authorizes the government to "obtain information by any lawful means concerning the trustworthiness of persons associated with the defense" and to "bring such information to the attention of the court for the court's consideration in framing an appropriate protective order," result in significant limitations upon the defense and subject persons acting for the defense to damage to their reputations, without providing adequate standards for the court to apply or an opportunity for the defense to meet the information? Does this section authorize ex parte communications with the court? Does this provision authorize use of national security electronic surveillance under 50 U.S.C. § 1801, et seq. (which does not require probable cause that a crime has been committed) targeted at persons acting for the defense?

4. Several sections of the Procedures may be unnecessarily one-sided in favor of the government. For example, section 8 requires the defense but not the government to obtain prior approval of the court before gaining access to classified information in the custody of the court. Since not all Assistant U.S. Attorneys have adequate security clearances, is there any reason why the prior approval requirement should not apply to the government as well? Section 8 also may not provide adequate assurance that the defense will be given reasonable access to classified information under reasonable conditions, since "classified information shall remain in the control of the court security officer." Does this provision authorize the court security officer to review any notes made by defense counsel who has reviewed classified information to assure that they do not contain classified information? Section 9 requires that every defense document, but not every government document, be filed under seal subject to screening for classified information by the court security officer. As a result, the public may obtain a very one-sided, government-oriented account of significant matters of public interest.

5. Does the selection and role of the court security officer entrench upon separation of powers, and unfairly restrict the defense, the media and the public in gaining access to important information? While the court security officer is an employee of the judicial branch, section 2 requires that the court security officer be selected by the court from a list provided by the Executive Branch, and, indeed, the court security officer "may be an employee of the Executive Branch of the Government detailed to the court for this purpose." Section 9 of the Procedures provides, in essence, that the court security officer performs the job of classifying documents "after consultation with the attorney for the government . . ." As already mentioned, every document filed by the defendant is filed under seal and turned over to the court security officer who "shall promptly examine the document and, in consultation with the attorney for the government or representative of the appropriate agency, determine whether it contains classified information." Apparently, if any part of a document contains classified information, the entire document remains under seal. No provision is established for a challenge by the defendant or the public or media to any classification marking made by the court security officer. The selection and consultation provisions raise separation of powers questions, and the procedures may not provide adequate safeguards against unnecessary or overclassification of documents. Do the consultation provisions authorize ex parte communications by the government with the court which would violate the American Bar Association's Code of Professional Responsibility and the ABA's Criminal Justice Standards for the Prosecution Function? Could the government under this procedure prevent disclosure of embarrassing information that does not threaten to compromise national security?

6. Section 12 of the Procedures provides that expenses which arise in connection with implementation of the Procedures shall be borne by the Executive Branch. While this may be reasonable, in light of the recent change in the Administration and budgetary considerations, it may be that the new Administration would not wish to bind itself to this allocation of expenses.

7. Section 13 of the Procedures, which provides that questions of interpretation concerning the Procedures "shall be resolved by the court in consultation with the Department of Justice Security Officer and the appropriate Executive Branch agency security officer," also raises questions of separation of powers and improper ex parte communications with the court by virtue of its requirement of "consultation."

The questions discussed above are not intended as an exhaustive list of issues raised by the Procedures. Also, as indicated at the outset, because of time limitations the State Bar Board of Governors—which must approve positions taken on behalf of the State Bar—has not adopted a formal position on the Procedures. Rather, in light of the important issues raised by the Procedures, the Federal Courts Committee believes that the effective date of the Procedures should be delayed to allow us and other interested groups to study and comment on the Procedures.

We greatly appreciate your cooperation with the Federal Courts Committee in providing a copy of the Procedures to us. If you or your staff have any questions regarding the contents of this letter, please do not hesitate to contact us.

Sincerely,

MARTIN GLENN,
Vice Chair,
Federal Courts Committee.

BACKGROUND MATERIAL FOR CHAIRMAN EDWARDS ON THE SECURITY PROCEDURES FOR THE PROTECTION OF CLASSIFIED INFORMATION IN THE CUSTODY OF THE FEDERAL COURTS

This memorandum is in response to an inquiry from the State Bar of California which was received by Congressman George E. Danielson and was forwarded to Chairman Don Edwards of the House Subcommittee on Civil and Constitutional Rights. The inquiry raises questions about the interpretation of certain sections of the security procedures established pursuant to the Classified Information Procedures Act of 1980. Many of the points have been addressed previously in the memorandum submitted to Congressmen Edward P. Boland and Peter W. Rodino. Some of the points raised by the State Bar of California, however, were not addressed in the previous memorandum and deserve response.

SEPARATION OF POWERS

One of the dominant concerns expressed in the letter from the State Bar of California is that some aspects of the security procedures may run counter to the principle of separation of powers. This concern arises because Section 2 of the security procedures provides that the court security officer "may be an employee of the Executive Branch of the Government detailed to the Court." It should be noted at the outset that the concept of using Executive Branch personnel to provide assistance to courts in cases involving threats to the national security was first suggested by the Supreme Court of the United States in *United States* v. *United States District Court,* 407 U.S. 297, 321 (1972). In addition, there is precedent for the practice of using Executive Branch employees in the federal courts. United States Marshals, for example, are appointed by the President and supervised by the Attorney General, but are designated for service in the various district courts. The Marshals are privy to many activities of the judges. They frequently attend proceedings in the judges' chambers, particularly if the proceedings require the attendance of the defendant in a criminal case, but they are expected to maintain total neutrality and confidentiality with respect to such proceedings. The fact that United States Marshals are both paid and supervised by the Executive Branch has not created any difficulties; nor is their service considered to be a violation of separation of powers. Court security officers who are employees of the Executive Branch are comparable to United States Marshals in that they will be paid by the Executive Branch and will continue to be considered employees of the Executive Branch while they serve in the Judiciary.

The letter from the State Bar of California also suggests that there may be a separation of powers problem in Section 13 of the procedures. Section 13 provides that questions concerning the interpretation of the procedures are to be resolved by the court in consultation with the Department of Justice Security Officer and the appropriate Executive Branch agency security officer. This section is a reasonable effort to deal with problems that may arise in the implementation of the security procedures. The court cannot be expected to analyze and resolve effectively all security-related matters, such as problems relating to the installation of security devices and the approval of the use of various types of security containers. Nor should the defense be concerned with these issues. For this reason, the security procedures authorize the court to confer with representatives of the Executive Branch who have expertise in matters concerning security. All final decisions about the interpretation of the rules will be made, of course, by the court and not by anyone from the Executive Branch.

A related issue involving separation of powers is the duty of the court security officer to mark all court documents containing classified information with the appropriate level of classification. Section 9 of the procedures provides that, with respect to documents filed by the defendant, "the court security officer shall promptly examine the document and, in consultation with the attorney for the government or represenatives of the appropriate agency, determine whether it contains classified information." The State Bar of California expressed concern about the court security officer's duty to examine documents submitted to the court by the defense. In particular, the

State Bar of California suggested that defense documents submitted to the court by defense counsel might be over-classified or classified unnecessarily by the court security officer. It is unlikely, however, that this will be a problem since the security procedures do not confer upon the court security officer any independent classification power. They do not give him authority, in other words, to determine what information should be classified. Under the security procedures, the court security officer has only the power to identify information that previously has been classified and to mark the information with the classification rating it already has received. While a defendant, or for that matter any member of the public, is authorized to challenge an agency's classification decision (*see* Executive Order 12065), the challenge would not be directed to the court security officer, but rather to the appropriate Executive Branch agency. (The procedures for challenging the classification of Executive Branch-generated information are set forth in programs established by the various Executive Branch agencies.)

BIAS OF PROCEDURES IN FAVOR OF GOVERNMENT

Another area of concern raised in the letter from the State Bar of California is that the security procedures may be unnecessarily one-sided in favor of the government. This claim already has been discussed in the previous memorandum. A number of additional points, however, can be made.

The State Bar of California contends that under Section 8(A) of the security procedures only defense counsel are required to obtain prior approval from the court before gaining access to classified information of the government which is in the custody of the court. As a practical matter, all Assistant United States Attorneys who are prosecuting cases involving classified information will have received the proper security clearance. For this reason it was unnecessary to include government attorneys in the Section 8(a) requirement.

Other examples of perceived "one-sidedness" in the security procedures concern the role of the court security officer. The court security officer's primary responsibility is to prevent the unauthorized disclosure of classified information in the custody of the federal courts. The court security officer, however, has no authority under the security procedures to determine who may have access to classified materials or under what conditions the materials may be reviewed; these are matters for the court to decide in the exercise of its discretion, not the court security officer. Nor is the court security officer authorized under the security procedures to restrict, on his own initiative, defense access to classified information; this too is a matter for the court alone to decide. While the court security officer is authorized by the security procedures to seal and retain notes made by the defense during an examination of classified information, he is not permitted by the procedures to read or copy any of the notes. The duties of the court security officer, thus, are clearly ministerial in nature; he is not an agent or representative of the prosecution and he has no independent authority to decide who gets access to classified information. What is clear is that the power to decide who has access to classified information and under what conditions is retained and exercised by the court and not by the court security officer.

EX PARTE COMMUNICATIONS

Another question raised by the State Bar of California is the extent to which the security procedures authorize ex parte communications with the court by the prosecution. Nowhere in the procedures is the subject of ex parte communications addressed. Ex parte communications are neither authorized nor precluded by the procedures. Section 5 of the procedures provides that the government may bring information which it has obtained concerning the trustworthiness of the defense to the attention of the court for the court's consideration in framing a protective order. Whether this information is to be communicated to the court ex parte or in the presence of the defendant is a decision to be made by the trial judge, consistent with local rules and professional ethics. (Parenthetically, there is nothing in Section 5 which authorizes the use of national security electronic surveillance under 50 U.S.C. §1801 et seq.)

The matter of ex parte communications also was raised in connection with Section 9(a), which requires the court security officer to consult with the attorney for the government or representative of the appropriate agency to determine whether documents submittted by the defendant contain classified information. As previously noted, the determination made about the classification status of defense submission is essentially a routine matter which involves purely objective criteria. Moreover, the consultation is made with the court security officer, not with the judge, and the subject matter of the consultation has nothing to do whatsoever with any procedural or substantive issue in the case. In short, the consultation requirement in Section 9(a) does not violate the American Bar Association's Code of Professional Responsibility or the ABA's Criminal Justice Standards for the Prosecution Function.

PAYMENT OF EXPENSES

Finally, the issue of payment of expenses is raised in the letter from the State Bar of California. Section 12 of the security procedures provides that expenses of the United States Government which arise in connection with the implementation of the procedures should be borne by the Department of Justice or other appropriate Executive Branch agency. The suggestion was advanced by the State Bar of California that the new administration might not wish to bind itself to this allocation of expenses. It is not clear what alternative souces of payment are available. Expenses of the federal government incurred in the prosecution of federal cases must necessarily be borne by the administration. The only possible issue is which branch of the government should pay. Since the expenses involved in implementing the security procedures are expenses connected with the prosecution of the case, it is reasonable and entirely consistent with government fiscal policy to provide that the Executive Branch will be the responsible financial agent. This conforms with the opinion of the Comptroller General that prosecution expenses should be paid by the Executive Branch. See e.g., 58 C.G. 259 (1979), 39 C.G. 133, 137 (1959), B-139703 (March 21, 1980).

The issues raised by the State Bar of California have been considered and addressed. It is clear on review that the security procedures do not interfere with the separation of powers, are not one-sided in favor of the government, and do not authorize ex parte communications in contravention of professional codes of ethics. The security procedures are basically housekeeping measures for the court to use in safeguarding classified information. They are not addressed to the Executive Branch, and they will neither benefit the prosecution, nor hinder the defense. The security procedures are a fair, reasonable, and effective means of protecting classified information in the custody of the courts from unauthorized disclosure.

It is recommended that the procedures be given an opportunity to work in their current form. They have been in effect since March 30, 1981, and they should have time to be tested. While no problems with the procedures are anticipated, if difficulties do arise the procedures can be amended in accordance with Section 9(a) of the Act. If amendments are necessary, they can then be made in the light of experience.

PERMANENT SELECT COMMITTEE ON INTELLIGENCE,
Washington, D.C., September 11, 1981.

Hon. WARREN E. BURGER,
Chief Justice of the United States,
Supreme Court of the United States,
Washington, D.C.

DEAR MR. CHIEF JUSTICE: Thank you for your letter and memorandum of July 10 concerning the security procedures promulgated pursuant to the Classified Information Procedures Act.

The memorandum does allay many of the concerns which we expressed in our letter of March 19. However, we remain troubled by section 5 of the procedures.

We are troubled not by the fact that "the government may obtain information by any lawful means concerning the trustworthiness of persons associated with the defense," nor by the fact that, in fashioning a protective order, a trial court may consider such information. Rather, we are concerned (1) that the subject is treated at all, (2) that the authority of the trial judge and the government to engage in such actions appears to flow from the security procedures, and (3) that, in the future, section 5 could be used as precedent to confer or withhold other substantive authorities. None of this, in our view, is within the scope of procedures clearly intended to deal only with the manner in which classified information is physically safeguarded when in the custody of the federal courts.

Therefore, when, as noted in your letter of July 10, a reexamination of the security procedures is conducted, we recommend that section 5 be struck.

Sincerely yours,

EDWARD P. BOLAND,
Chairman, Permanent Select Committee on Intelligence.

PETER W. RODINO, Jr.,
Chairman,
Committee on the Judiciary.

A TRIBUTE TO RABBI SAMUEL COOPER

HON. CLEVE BENEDICT

OF WEST VIRGINIA

IN THE HOUSE OF REPRESENTATIVES

Thursday, October 15, 1981

● Mr. BENEDICT. Mr. Speaker, on November 1, 1981, the congregation of B'nai Jacob Synagogue in Charleston, W. Va., is honoring its retiring rabbi, Samuel Cooper, who is leaving the congregation after 49 years of service. Rabbi Cooper has served the congregation, and the entire State of West Virginia, with much dedication and distinction, and I would like to share with my colleagues some of Rabbi Cooper's accomplishments.

Rabbi Samuel Cooper was ordained at Yeshivas Rabbi Isaac Elchanan in New York, and received his bachelor of science and honorary D.D. at the College of City of New York and Uni-

versity of Charleston, respectively. He was made rabbi of B'nai Jacob Synagogue in Charleston, W. Va. in 1932 and has remained in that position to serve the people for the past 49 years. In 1964, Rabbi Cooper was distinguished with the award, "West Virginian of the Year."

Rabbi Cooper has, among many other activities, served as chairman of the West Virginia Human Rights Commission, on the board of trustees for the American Red Cross, was West Virginia's delegate to the American Jewish Conference, and delegate to the World Zionist Congress in Basle, Switzerland.

Mr. Speaker, as the congregation of B'nai Jacob Synagogue honors their beloved rabbi, I too, would like to pay tribute to a man who has given so much to so many.●

DIALOG ON EL SALVADOR

HON. GERRY E. STUDDS

OF MASSACHUSETTS

IN THE HOUSE OF REPRESENTATIVES

Thursday, October 15, 1981

● Mr. STUDDS. Mr. Speaker, on September 24, Assistant Secretary of State Thomas Enders testified before the House Subcommittee on Inter-American Affairs concerning U.S. policy toward El Salvador. At that hearing, Secretary Enders repeatedly expressed the view that the opposition groups now in conflict with the existing military forces of El Salvador have been unwilling to engage in an unconditioned dialog with government officials.

Because this is an issue of such importance, I would like to insert in the RECORD a statement issued by the combined opposition groups of El Salvador concerning the question of negotiations, and also concerning the prospects for the establishment of democratic institutions in that country. Although I do not necessarily agree with all of the assertions made in this document, I do believe it is an important statement which ought to be considered by the Congress when making judgments about proper U.S. policy toward El Salvador. The text of the statement, which was presented to the United Nations on October 4, is as follows:

"The Farabundo Marti Front for National Liberation and the Revolutionary Democratic Front (FMLN-FDR), hereby, direct ourselves to the international community and the peoples of the world insofar as we consider the United Nations Organization to be an expression of the principles of peace, justice and equality among States and peoples. Therefore it is an appropriate forum to present the aspirations of the Salvadoran people and its representative organizations, the FMLN and the FDR.

In the first place we wish to express our gratitude for the multiple expressions of solidarity received throughout our struggle, both from governments and political, social and religious organizations, and well-known personalities throughout the world. We particularly want to express our gratitude for the solidarity given by the governments and peoples of Mexico and France, that have recognized our Fronts as politically representative forces. Likewise, we want to thank the great majority of the countries that make up the international community for their expressions and initiatives in favor of a political solution.

If today our people are waging an armed struggle under the leadership of its organizations, the FMLN and the FDR, this is because oppressive and repressive regimes have closed all peaceful avenues for change, thus leaving our people with only armed struggle as the sole and legitimate means to attain its liberation, thereby exercising the universal and constitutional right to revolt against illegal and repressive authorities.

Our struggle is, therefore, a just and necessary struggle to build peace and equality among all the Salvadoran people.

However, our desire is peace. To attain it we propose a political solution whose objective is to put an end to the war and establish a new political and economic order that will guarantee the Salvadoran people the full exercise of their rights as citizens and a life worthy of human beings.

All this entails our expressed willingness to start a dialogue with the civilian and military representatives that the Junta may appoint through a process of peace talks.

We propose that these peace talks which reffirm our commitment to seek and implement a political solution be based on the following general principles:

1. The talks should be carried out between the delegate appoints by the FMLN-FDR and representatives of the Government Junta of El Salvador.

2. They should be carried out in the presence of other governments, that as witnesses will contribute to the solution of the conflict.

3. The nature of the talks must be global and include the fundamental aspects of the conflict. They must be based on an agenda established by both parties.

4. The Salvadorean people should be informed of the entire process.

5. They should be initiated without pre-established conditions by either party.

In an effort to establish a basis that will guarantee a political solution, the FMLN-FDR, hereby express their willingness to discuss the following points:

A. Definition of a new political, economic and judicial order that will allow and stimulate the full democratic participation of the different political, social and economic sectors and forces, particularly those that have been marginated. Elections will be an important element as a mechanism of popular participation and representation.

B. The restructuring of the Armed Forces, based on the officers and troops of the current army who are not responsible for crimes and genocide against the people, and the integration of the hierarchy and troops of the FMLN.

Our fronts consider elections a valid and necessary instrument of expression of the people's will whenever conditions and atmosphere exist that allow the people to freely express their will. In El Salvador today we do not have those conditions to carry out electoral process, inasmuch as the regime's repressive apparatus which assassinates political and labor leaders and activists remain untouched; it persists in persecuting the progressive sectors of the Church and is responsible for the daily physical elimination of dozens of citizens, likewise the regime has currently in effect a state of siege, martial law and press censorship and is escalating the war against the people with arms and advisers sent by the Government of the United States.

A political solution is necessary for our people, for the stability of the region, and for the maintenance of peace and security among nations. This implies that governments should scrupulously observe the principle of non-intervention in the internal affairs of other peoples. This is why we are directly addressing the Government of the United States and demanding an end to its military intervention in El Salvador, which is against the interests of both the Salvadoran and American peoples and endangers the peace and security of Central America.

Our proposal responds to the demands for justice which are in line with the purest principles of international law, and of the interests of the nations and peoples of the world searching for peaceful solutions to points of tension. To this effect, the Salvadoran people express their confidence in the understanding, participation and support of the international community in the attainment of its right to peace, freedom and independence."

UNIFIED REVOLUTIONARY DIRECTORATE OF THE FARABUNDO MARTI FRONT FOR NATIONAL LIBERATION (FMLN)

EXECUTIVE COMMITTEE OF THE REVOLUTIONARY DEMOCRATIC FRONT (FDR)●

RECOGNITION OF THE ESCROW ASSOCIATION OF SANTA CLARA VALLEY

HON. NORMAN Y. MINETA

OF CALIFORNIA

IN THE HOUSE OF REPRESENTATIVES

Thursday, October 15, 1981

● Mr. MINETA. Mr. Speaker, I would like to call to the attention of my colleagues the Escrow Association of Santa Clara Valley, a regional association of the California Escrow Association which has been in existence since 1924 and now has over 3,500 members within 29 regional associations throughout the State of California.

The Escrow Association of Santa Clara Valley has been dedicated to the continuing education and elevation of the escrow profession through adherence to its code of ethics for 8 years and has faithfully pursued its covenant to foster, promote, and improve escrow education and service to its members and to the public to elevate the standards of the escrow profession. During this month, the California Escrow Association will hold its 26th annual education conference.

Mr. Speaker, on this occasion, I ask you and all my colleagues in the House to join with me in commending the officers, directors, and members of the Escrow Association of Santa Clara Valley for their outstanding contributions to the people of this community.●